INDEX

	PAGE
Petition for Rehearing	1
Conclusion	10

TABLE OF CITATIONS

CASES:	
Board of Education v. Blodgett (1895), 155 Ill. 441, 40 N.E. 1025, 31 L.R.A. 70, 45 Am. St. Rep. 348	4
Covington and L. Turnpike Road Co. et al. v. Sandford et al., 164 U.S. 578, 17 S. Ct. 198, 41 L. Ed. 560 (1896)	2
Gretna v. Bailey (1917), 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566	5
Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, L. Ed. (1936)	3
Lawrence v. Louisville (1895), 96 Ky. 595, 29 S.W. 450, 27 L.R.A. 560, 49 Am. St. Rep. 309	5
State of South Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 789	1, 2
Warren County, Mississippi v. Hester, 219 La. 743, 54 S. 2d 12	2
ACT:	
Act of August 14, 1963, P. L. 819 (17 P.S. 181 et seq.)	7

CONSTITUTION:

U. S. Constitution:

Fifth Amendment 1, 2

Fourteenth Amendment 1, 2, 4

TEXT:

McQuillan on Municipal Corporations, 3rd Ed., Vol. 1, p. 460 3

PETITION FOR REHEARING

The appellant, the Township of Springfield, Delaware County, Pennsylvania, respectfully requests that your Honorable Court grant rehearing of its order dated December 11, 1967 which dismissed its appeal for want of jurisdiction and, treating the papers whereon the appeal was taken as a petition for a writ of certiorari, also denied certiorari. The appellant further respectfully requests your Honorable Court to now note probable jurisdiction, or, in lieu thereof, to grant certiorari.

The Jurisdictional Statement previously filed presented the question that Rule 68 1/2 of the Supreme Court of Pennsylvania is an abuse of due process under the Fourteenth Amendment of the Constitution of the United States in that it attempted to abolish the right to appeal in the nature of a broad certiorari which had heretofore existed as a part of the common law of Pennsylvania.

In the Jurisdictional Statement no authority was cited to justify the right of the Township of Springfield to raise such a question. The appellant assumed that its property rights were protected by the Constitution of the United States to the same extent as are the rights of any other property owner.

The motion by appellees to dismiss or affirm raised the issue that the word "person" in the context of the due process clause of the Fifth Amendment cannot be expanded to encompass the states of the union, citing *State of South*

Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2nd 769. It then argues that the same reasoning is applicable to the language of the Fourteenth Amendment and that it also applies to political subdivisions of a state and cites only one case in support of this contention, namely *Warren County, Mississippi v. Hester*, 219 La. 743, 54 So. 2nd 12.

It is respectfully submitted that such argument is fallacious. A reading of the Fifth Amendment beside the Fourteenth Amendment will clearly show that they are not interdependent. Every word in the Fifth Amendment shows that it was intended to protect individuals. The words "held to answer for a capital or otherwise infamous crime" "twice put in jeopardy of life and limb", and "witness against himself" by no stretch of the imagination could be applied to a corporation, private or municipal.

However, there is no such language in the Fourteenth Amendment. Section 1 was directed at arbitrary actions of States and while it is apparent that the State itself cannot be protected against its own action, it is equally clear that associations other than individuals may need the protection of this amendment.

It has been held in a long line of cases in your Honorable Court including *Covington and L. Turnpike Road Co. et al. v. Sandford et al.*, 164 U.S. 578, 17 S. Ct. 198, 41 L. Ed. 560 (1896), that corporations are "persons" within the language of the Fourteenth Amendment. In that case, Mr. Justice Harlan said at page 592:

> "It is now settled that corporations are persons within the meaning of the Constitutional provisions

forbidding the deprivation of property without due process of law, as well as the denial of the equal protection of the laws. Santa Clara Co. v. Southern Pac. Ry. Co., 118 U.S. 394, 6 Sup. Ct. 1132; Pembrook Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189, 8 Sup. Ct. 737; Railroad Co. v. Beckwith, 129 U.S. 29, 9 Sup. Ct. 207; Railroad Co. v. Gibbes, 142 U.S. 386, 391, 12 Sup. Ct. 255."

Again in *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, L. Ed. (1936), your Honorable Court said at page 244:

"Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held is not a 'citizen' within the meaning of the privileges and immunities clause. Paul v. Virginia, 8 Wall 168, 19 L. Ed. 357. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. Covington & L. Turnpike Co. v. Sandford (supra); Smyth v. Ames, 169 U.S. 466, 522, 18 S. Ct. 418, 42 L. Ed. 819."

No case involving the application of this principle to municipal corporations appears to have reached your Honorable Court but it is respectfully submitted that the same reasoning is applicable at least with respect to their proprietary interests. The dual nature of municipal corporations was pointed out in *McQuillan on Municipal Corporations,* 3rd Edition, Volume 1, page 460, as follows:

"The purposes of municipal corporations, using the term in its strict meaning, are two-fold, the one to

assist in the government of the state as an agent of the state, often referred to as an arm of the state, and to promote the public welfare generally; the other to regulate and to administer the local and internal affairs of the territory which is incorporated, for the special benefit and advantage of the urban community embraced within the corporate boundaries. These two functions are usually referred to as the dual powers of municipal corporations, as noted in the preceding chapter of this work. When acting in their private or proprietary character, they are a separate entity acting for their own purposes, and not a subdivision of the state, and they represent those proprietary interests that appertain to them in common with other corporations. Private powers of a municipal corporation are synonymous with the terms home rule and local self-government."

This distinction has been recognized in many cases. Thus in *Board of Education v. Blodgett* (1895), 155 Ill. 441, 40 N.E. 1025, 31 L.R.A. 70, 45 Am. St. Rep. 348, holding that a school district's defense to a money demand, arising from a complete running of the statute of limitations, was within the protection of the Fourteenth Amendment to the Federal Constitution, the Court stated:

"The *political rights and privileges* delegated to counties, school districts and cities are not within the constitutional provisions against laws which impair vested rights but their *property rights* are protected by the same constitutional guaranties which shield the property of individuals from legislative aggression."

See *Lawrence v. Louisville* (1895), 96 Ky. 595, 29 S.W. 450, 27 L.R.A. 560, 49 Am. St. Rep. 309, which also in-

volved the defense of the statute of limitations raised by the City of Louisville. There the Court said:

> "The law making branch of the government has no more power to destroy a defense that has accrued than it has to take a citizen's property 'without due process of law'. When one is released from a demand by the statute of limitations, his right of defense is as valuable as the right (of the plaintiff) to institute the action. When the defense has accrued, right to maintain the action is destroyed."

In *Gretna v. Bailey* (1917), 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566, holding unconstitutional as a whole a statute providing for a commission form of government for a certain city, on the ground that the act undertook to establish a city court not authorized by the State Constitution, it was held:

> "A municipal corporation, being the creature of the legislature, cannot question the authority of its creator to amend or abrogate its charter, *except insofar as the legislature attempts to exceed its own constitutional authority.* But the General Assembly is as well bound not to violate the mandates expressed in the Constitution as a corporation created by the legislature is controlled by its statutes. *Hence a municipal corporation, having authority to prosecute and defend suits in the courts, may invoke the protection afforded by the Constitution to prevent a violation of its rights.*"

It is respectfully submitted that the reasoning in the foregoing cases is sound and that it is applicable to the present case. It was not the political rights of the Town-

ship of Springfield that were affected by Rule 68 1/2 of the Supreme Court of Pennsylvania; it was the property rights of the Township. Prior to April 1, 1964, it had an unqualified right to appeal the decision of the Court of Common Pleas to the Supreme Court of Pennsylvania. That right, in common with all other persons in the Commonwealth had become a part of the common law of Pennsylvania. Rule 68 1/2 of the Supreme Court (which had the effect of a statute) was not an action of the Commonwealth specifically designed to regulate one of its political subdivisions, but was applicable to all classes of persons which would be affected thereby. In this particular case, had the decision in the lower court been against the appellee and they had presented a petition to the Supreme Court under Rule 68 1/2, which was refused, they would certainly be a "person" entitled to raise the constitutional question. It is respectfully submitted that the Township of Springfield is likewise entitled to do so, since the procedural question has nothing to do with its political status.

It is respectfully submitted that Rule 68 1/2 of the Supreme Court of Pennsylvania is invalid for an additional reason which was not discussed on the Jurisdictional Statement previously filed. In Pennsylvania there are two courts of appellate jurisdiction, the Superior Court and the Supreme Court. Without going into details concerning subject matters not here involved, it is sufficient to state that in general the principal difference between the jurisdiction of the two courts was determined by the amount in controversy. Thus, an appeal, including an appeal in a zoning matter, which did not exceed ten thousand dollars ($10,000.00) would be taken to the Superior Court, while one which involved over ten thousand dollars ($10,000.00) would be taken to the Supreme Court.

However by the Act of August 14, 1963, P. L. 819 (17 P.S. 181 et seq.), effective December 1, 1963, the respective jurisdiction of the Supreme and Superior Courts was changed and, in general, was determined by the subject matter of the controversy rather than the amount in controversy.

Section 7 4 of the new act (17 P.S. 191.4), provided as follows:

"In the following classes of cases, the Superior Court shall have no jurisdiction thereof, but the *appeal* from the judgment, order or decree of the lower court *shall be taken directly to the Supreme Court:*

(1) . . .;
(2) . . .;
(3) . . .;
(4) . . .;
(5) . . .;
(6) . . .;

(7) *Appeals* from orders of the courts of common pleas and courts of quarter session of the peace *involving or arising out of acts, ordinances, regulations or orders relating to zoning;*

(8) . . .;
(9) . . .;
(10) . . .;
(11) . . .;"

Thus as of December, 1963, the Act of 1963 specially spells out that *appeals* in zoning matters *shall be taken* directly to the Supreme Court. On February 5, 1964, ef-

fective April 1, 1964, the Supreme Court completely ignored the provisions of the Act of 1963 and substituted a petition for allowance of certiorari in lieu thereof. Thus, within a space of four months, the right to appeal to some court in zoning matters has been completely removed. The Act of 1963 deprived the Superior Court of jurisdiction but it can be said that it substituted another forum in its place. Rule 68 1/2 eliminated the right of appeal to the Supreme Court and substituted nothing except the largess of a Justice of the Court. It is respectfully submitted that this was not the intention of the Legislature and that the question is of vital importance, not only in this case, but to all situations where the rule is applicable.

The jurisdictional statement filed by appellant referred, on page 23, to the substantial and important issue involved in respect to the general, as opposed to the specific, unconstitutionality of the zoning ordinance amendment. The crucial aspect of this issue may have been overlooked since your appellant did not present the problem in detail. Appellant submits that the opinion of the Court of Common Pleas declares the zoning ordinance generally unconstitutional in respect to minimum frontage and area requirements for a restaurant in a business zoning district and such declaration is not limited to the specific property of the appellees.

Finding of Fact No. 32 (page 49, Jurisdictional Statement) found in the opinion of the Court of Common Pleas is a broad and sweeping assertion of unconstitutionality applicable to all restaurants, to wit:

> "32. The requirement that a restaurant should have two hundred fifty (250') feet of frontage and not less than one hundred twenty-five thousand (125,000)

square feet in area is an unreasonable, arbitrary, unnecessary, discriminatory and confiscatory requirement and has no relation whatsoever to the health, safety, morals or general welfare of the Township of Springfield."

The appellant, by reason of the adoption and application of Rule 68 1/2 by the Supreme Court of Pennsylvania, which has the force and impact of a statute enacted by the state legislature, has been unconstitutionally denied the right of appellate review to determine not only the soundness of the trial court's decision and the facts upon which it is based, but the scope of the same. So long as these questions remain unresolved it can be reasonably anticipated that the appellant will be obliged to face litigation and challenge in regard to every zoning use application for not only restaurants but for hotels, hospitals, clubs, sanatoria, places of amusement, fraternity houses and lodges in any business district wheresoever situate. To the extent that the alleged unconstitutionality is interpreted as being broad in scope the matter is of the utmost importance to the appellant municipality and its citizenry which approaches 30,000 in number and effects property rights and interests having uncalculable but substantial value.

The imposition of Rule 68.1/2 permits and encourages zoning litigation to be terminated at the level of the inital court of record in Pennsylvania and since there are fifty-nine (59) judicial districts of equal standing judicially, such serious matters as constitutionality in zoning will continue to be decided in separate forums without the controlling influence of review by the Supreme Court of Pennsylvania. In comparison to this existing situation, it is noteworthy that your Honorable Court under Rule 19(b)

has indicated that conflicting decisions of courts of appeals will be considered as a basis for granting review on a writ of certiorari.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as the reasons set forth in the Jurisdictional Statement previously filed, it is respectfully submitted that a rehearing or certiorari should now be granted.

Respectfully submitted,
READ ROCAP, JR.
Attorney for Appellant

Certificate of Counsel

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

READ ROCAP, JR.
Attorney for Appellant